FOR ARGUMENT

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IN THE

# Supreme Court of the United States

BOY SCOUTS OF AMERICA and MONMOUTH COUNCIL, BOY SCOUTS OF AMERICA,

*Petitioners,*

*v.*

JAMES DALE,

*Respondent.*

ON WRIT OF CERTIORARI TO THE NEW JERSEY SUPREME COURT

## BRIEF OF SOCIETY OF AMERICAN LAW TEACHERS AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

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3 HPR

## TABLE OF CONTENTS


Page

TABLE OF AUTHORITIES ..... iii

STATEMENT OF INTEREST ..... 1

STATEMENT OF FACTS ..... 1

SUMMARY OF ARGUMENT ..... 3

ARGUMENT ..... 6

I. NEW JERSEY'S ANTI-DISCRIMINATION LAW DOES NOT COMPEL THE BOY SCOUTS TO EXPRESS ANY VIEWS INIMICAL TO THEIR OWN. ..... 6

A. The Boy Scouts Expelled Dale for His Status, Not for His Views. ..... 7

B. *Hurley* Protects the Right to Speak, Not the Practice of Status-Based Discrimination. ..... 9

II. NEW JERSEY'S ANTI-DISCRIMINATION LAW DOES NOT VIOLATE THE BOY SCOUTS' RIGHT OF ASSOCIATION. ..... 13

A. The Boy Scouts' Right of Expressive Association Does Not Encompass a Right to Discriminate Based on Status. ..... 14

B. Opposition to Homosexuality is Not So Central to the Boy Scouts' Function That a Nondiscrimination Requirement Will in Itself Substantially Undermine Their Expressive Purposes. ..... 17

C. The Boy Scouts Are Not an Intimate Association. ..... 21

D. Any Limitation on the Boy Scouts' Expressive Associational Rights Is Justified By New Jersey's Compelling Interest in Eradicating Invidious Discrimination ..... 22

CONCLUSION ..... 26



## TABLE OF AUTHORITIES

**Page(s)**

**Cases**

*Board of Dirs. of Rotary Int'l v. Rotary Club of Duarte*,
481 U.S. 537 (1987) ..... 8, 14, 15, 22

*Bob Jones Univ. v. United States – Goldsboro Christian Sch., Inc.*,
461 U.S. 574 (1983) ..... 25

*Boyd v. Harding Academy of Memphis, Inc.*,
88 F.3d 410 (6th Cir. 1996) ..... 12

*Brown v. Board of Education*,
347 U.S. 483 (1954) ..... 14

*Cline v. Catholic Diocese of Toledo*,
No. 98-3527, 2000 WL 272258 (6th Cir. Mar. 14, 2000) ..... 12

*Cohen v. Cowles Media Co.*,
501 U.S. 663 (1991) ..... 25

*Edwards v. South Carolina*,
372 U.S. 229 (1963) ..... 10, 11, 12

*Ganzy v. Allen Christian Sch.*,
995 F. Supp. 340 (E.D.N.Y. 1998) ..... 12

*Harvey v. Young Women's Christian Ass'n*,
533 F. Supp. 949 (W.D.N.C. 1982) ..... 13

*Heart of Atlanta Motel, Inc. v. United States*,
379 U.S. 241 (1964) ..... 23

*Hishon v. King & Spalding*,
467 U.S. 69 (1984) ..... 14, 15

*Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*,
515 U.S. 557 (1995)..... passim

*M.P. v. S.P.*,
169 N.J. Super. 425, 404 A.2d 1256 (App. Div. 1979)..... 24

*Matter of Adoption of Child by J.M.G.*,
267 N.J. Super. 622, 632 A.2d 550 (Chancery Div. 1993)..... 24

*Matter of Adoption of Two Children by H.N.R.*,
285 N.J. Super. 1, 666 A.2d 535 (App. Div. 1995)..... 24

*McKennon v. Nashville Banner Publ'g Co.*,
513 U.S. 352 (1995)..... 8

*Moore v. City of East Cleveland, Ohio*,
431 U.S. 494 (1977)..... 22

*New York State Club Ass'n, Inc. v. City of New York*,
487 U.S. 1 (1988)..... passim

*Norwood v. Harrison*,
413 U.S. 455 (1973)..... 14

*Pruneyard Shopping Ctr. v. Robins*,
447 U.S. 74 (1980)..... 23

*Railway Mail Ass'n v. Corsi*,
326 U.S. 88 (1945)..... 15

*Roberts v. United States Jaycees*,
468 U.S. 609 (1984)..... passim

*Romer v. Evans*,
517 U.S. 620 (1996)..... 23, 25



*Runyon v. McCrary*,
427 U.S. 160 (1976)..... passim

*Shuttlesworth v. City of Birmingham*,
394 U.S. 147 (1969)..... 10

*V.C. v. M.J.B.*,
319 N.J. Super. 103, 725 A.2d 13 (App. Div. 1999)..... 24

*West Virginia* State *Bd. of Educ. v. Barnette*,
319 U.S. 624 (1943)..... 13

*Wooley v.* Maynard,
430 U.S. 705 (1977)..... 13

*Wygant v. Jackson Bd. of Educ.*,
476 U.S. 267 (1986)..... 12

**Statutes**

N.J. STAT. ANN. § 10:2-1 (West 1999)..... 23

N.J. STAT. ANN. § 10:5-12 (West 1999)..... 12, 23

N.J. STAT. ANN. § 10:5-3 (West 1999)..... 25

N.J. STAT. ANN. § 10:5-4 (West 1999)..... 2

N.J. STAT. ANN. § 2A:53A-21 (West 1999)..... 24

N.J. STAT. ANN. § 2C:33-4 (West 1999)..... 24

**Other Authorities**

Florio Exec. Order No. 39 (Aug. 16, 1991) ..... 23

Frank Newport, *Some Change Over Time in American Attitudes Towards Homosexuality, but Negativity Remains*, THE GALLUP ORGANIZATION (Mar. 1, 1999) <http://www.gallup.com/poll/releases/pr990301b.asp.> ..... 20

Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 Harv. L. Rev. 1 (1959) ..... 14

Hoover's Online, *Boy Scouts of America Capsule* (last visited Mar. 23, 2000) <http://www.hoovers.com/co/capsule/2/0,2163,56152,00.html> ..... 21

ROBERT T. MICHAEL, ET AL., SEX IN AMERICA, 176 (1994) ..... 20

## STATEMENT OF INTEREST[1]

The Society of American Law Teachers (SALT) is an association of more than 800 individual law faculty members at over 150 law schools, which was founded in 1974 by a group of leading law professors dedicated to improving the quality of legal education by making it more responsive to societal concerns. As a membership organization of law teachers, SALT is particularly sensitive to the historic role the courts have played in upholding both nondiscrimination and anti-censorship principles. SALT has filed amicus briefs in federal and state courts on behalf of historically under-represented groups to support their claims to equal access to education, employment, and health care, and to full participation in civic life. SALT has also supported individuals and groups asserting First Amendment rights in courts and elsewhere. SALT is filing this brief because it supports the distinction this Court has drawn between viewpoint-based restrictions on membership, which the First Amendment protects, and status-based discrimination, which the First Amendment generally does not protect.

## STATEMENT OF FACTS

James Dale was a model Boy Scout. Before his expulsion, he had been a Boy Scout for 12 years, earning every honor and accolade available in Scouting. He is an Eagle Scout, and at age 19, became an Assistant Scoutmaster at the Boy Scouts' invitation.

In July 1990, however, the Boy Scouts learned that Dale was gay as a result of his appearance in a local

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[1] Written consent to the filing of this brief from the counsel of record for the parties has been lodged with the Court. Pursuant to Rule 37.6, counsel for Amici state that no counsel for a party authored this brief in whole or in part. The only monetary contribution to the production of the brief was made by the firm of Milbank, Tweed, Hadley & McCloy LLP, in the form of donated paralegal services and printing costs. The firm does not represent any party in the case.

newspaper article about a gay student group at Rutgers University, where Dale was a sophomore. The article identified Dale as a co-president of the Rutgers University Lesbian/Gay Alliance, but did not report any information regarding Dale's views. Upon learning this information, and only this information, the Boy Scouts expelled Dale.

The Boy Scouts have not sought to expel heterosexual leaders who have expressed public opposition to the Boy Scouts' view that homosexuality is immoral. The record here includes the declarations of several longstanding Boy Scout leaders who state that they believe homosexuality is not immoral. J.A. at 647-57 (Aff. of William Kirkner, BSA Asst. District Commissioner), 658-64 (Aff. of David Rice, BSA Asst. Scoutmaster), 665-74 (Aff. of Robert Smith, BSA Asst. Scoutmaster). None of them has been expelled. In addition, an entire troop has formally stated that "we do not agree that sexual orientation such as male or female homosexuality is immoral." J.A. at 627. The Boy Scouts renewed that troop's charter and have not sought to exclude its members or leaders. J.A. at 628. And the Boy Scouts are sponsored by several religious denominations that hold that homosexuality is not immoral and/or that gays and lesbians should not be discriminated against, including the Lutherans, J.A. at 556-61, and Presbyterians, J.A. at 562-66. The Boy Scouts have made no effort to disassociate themselves from these sponsoring denominations.

Dale sued under New Jersey's Law Against Discrimination (LAD), which prohibits public accommodations from discriminating on the basis of "race, creed, color, national origin, ancestry, age, marital status, affectional or sexual orientation" N.J. STAT. ANN. § 10:5-4 (West 1999). The LAD's only requirement is that public accommodations not discriminate based on the identity or status of a member of a protected group. The LAD does not prohibit groups from expressing messages of any kind, nor from excluding persons who express messages contrary to the group's ideology.



The New Jersey Supreme Court unanimously concluded that the Boy Scouts were a "public accommodation" under New Jersey law because: (1) they engaged in broad public solicitation of members, stating that they were "open to all boys"; (2) they maintained close relationships with federal and state governmental bodies; and (3) they were similar to other recognized public accommodations, such as Little League, day camps, and private schools.[2] Appendix to Petition for a Writ of Certiorari ("Pet. App.") at 15a-16a. These state law determinations are not subject to review here.

The Court also unanimously determined that application of the LAD to the Boy Scouts did not violate their rights of association or speech, concluding that the Boy Scouts were not an intimate association, and that the requirement that they not discriminate on the basis of a person's sexual orientation did not impermissibly infringe their expressive rights. This Court granted a writ of certiorari on that issue.

## SUMMARY OF ARGUMENT

When the Boy Scouts expelled James Dale in 1990, they knew that he had been an exemplary Boy Scout for 12 years. They knew that he had been admitted to the Order of the Arrow, reserved for "those Scout campers who best exemplify the Scout Oath and Law in their daily lives." They knew that he had become an Eagle Scout, and then, at the Boy Scouts' invitation, an Assistant Scoutmaster. They knew that he had taken or administered the Scout Oath on thousands of occasions, and that upon becoming an Assistant Scoutmaster, had committed himself to the Scout Oath and Law and the

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[2] The court also found that the Scouts did not fall into any of the LAD's three specified exceptions for (1) "distinctly private" groups; (2) religious educational facilities; and (3) individuals who act *in loco parentis*.

Declaration of Religious Principle. They also knew that he was gay.

It was on the basis of the last fact alone that the Monmouth Council expelled Dale, despite his exemplary record and demonstrated commitment to Scouting values and principles. As the Monmouth Council explained in a contemporaneous letter, the Boy Scouts "specifically forbid membership to homosexuals." Pet. App. at 12a-13a.

The question here is whether the Boy Scouts' First Amendment rights trump New Jersey's prohibition on such status-based discrimination. There is an inescapable tension between First Amendment rights of association and anti-discrimination laws. This Court, however, has consistently resolved that tension by drawing a clear line: It zealously protects private groups' ability to discriminate on the basis of *expression* as a necessary corollary of the right to speak, but it has never protected private discrimination on the basis of *status*.

That line requires affirmance of the unanimous opinion of the New Jersey Supreme Court. The LAD does not compel the Boy Scouts to express any views whatsoever, nor to accept as members or leaders any persons who express views contrary to their own. It merely provides that the Boy Scouts cannot expel Dale because of his identity as a gay man. Thus, this case is clearly distinguishable from *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557 (1995), where the law as applied required a private parade to include a *message* to which the parade organizer objected.

Recognizing this Court's consistent fidelity to the distinction between permissible state laws that require private groups not to discriminate on the basis of status and impermissible state laws that compel groups to accept persons whose views or speech they find objectionable, the Boy Scouts go to great lengths to portray Dale's expulsion as motivated by his views rather than his status. But their



contemporaneous explanation referred only to Dale's gay identity, not to his views. All the evidence they had of his views at the time, developed from 12 years of Scouting, was that he was fully committed to Scouting principles and values. Nothing he has said since then alters that. And indeed, had they expelled Dale for his views rather than his identity, the LAD would not have been violated. The fact that Dale was one of the Boy Scouts' 1.5 million adult "leaders" rather than one of 4 million youth members does not alter the analysis, because the Boy Scouts retain every right to require Dale to conform to their message.

The same analysis defeats the Boy Scouts' second defense, based on a right of association. While the Scouts do associate for some expressive functions, the requirement that they not discriminate on the basis of status does not impermissibly interfere with their expressive activities. Equally expressive private entities, including private schools and civic organizations, have advanced the same associational defense against civil rights laws; but where the discrimination was based on status rather than speech, this Court has consistently rejected those claims. *Roberts v. United States Jaycees*, 468 U.S. 609 (1984); *Runyon v. McCrary*, 427 U.S. 160 (1976). To prevail here, the Boy Scouts would have to show what no other association has ever been able to show: that their expressive rights are undermined by a law that permits them to say anything they please, and merely bars them from excluding persons on the basis of status.

In rare cases where the organization's primary message is exclusion *per se*, the First Amendment right of association may protect status-based exclusionary policies. The Ku Klux Klan, for example, may well have a First Amendment right not to admit African American members. But any such exemption from an otherwise generally applicable neutral nondiscrimination law must be narrowly drawn if equality norms are to be preserved. In fact, the Court has *never* recognized a private organization's claim that it has a constitutional right to discriminate on the basis of status,

even where the organizations were deeply committed to inculcating particular moral values and excluding certain classes of persons. *Roberts v. United States Jaycees*, 468 U.S. 609 (1984); *Runyon v. McCrary, 427 U.S. 160 (1976).*

The Boy Scouts are not like the Ku Klux Klan. They are not an organization whose central self-definition requires exclusion of openly gay youth and men. Indeed, their contention that admitting gay persons would undermine their expressive rights is fatally undermined by the fact that they do not even require members or leaders to subscribe to their views on homosexuality, and have not sought to expel heterosexual leaders who have publicly dissented from their policy. Instead, they have simply declared that gay youth and men, irrespective of their views, are ineligible for membership in the Boy Scouts. That is the essence of discrimination, not speech.

## ARGUMENT

## I.

## NEW JERSEY'S ANTI-DISCRIMINATION LAW DOES NOT COMPEL THE BOY SCOUTS TO EXPRESS ANY VIEWS INIMICAL TO THEIR OWN.

The Boy Scouts initially argue that their First Amendment right to speak has been infringed by the application of New Jersey's Law Against Discrimination. They maintain that this case is controlled by *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557 (1995), on the theory that here, as there, application of an anti-discrimination law compels them to express messages with which they disagree.

In fact, application of the LAD in this case compels no speech whatsoever. The LAD does not impede the Boy Scouts' right to express the view that homosexuality is immoral and to require that their members and leaders adhere



to that view. It prohibits only discrimination based on status, not viewpoint, and the Boy Scouts have engaged in the former.

### A. The Boy Scouts Expelled Dale for His Status, not for His Views.

Petitioners' effort to shoehorn the facts of this case into the *Hurley* paradigm ignores the Court's fundamental distinction between a private group's right to control its own speech, and a private group's exclusion of persons simply because of their status as members of a minority group.

*Hurley* upheld a private parade organizer's right to exclude marchers who sought to express messages contrary to the parade organizer's message. Central to the Court's holding was the fact that the private parade organizers "disclaim[ed] any intent to exclude homosexuals as such." *Hurley*, 515 U.S. at 572. Here, the Boy Scouts assert a right to do precisely what the parade organizers in *Hurley* forswore: to exclude individuals based solely on their identity as gay.

Unlike the gay contingent in *Hurley*, Dale was expelled for his identity, not his views. He was expelled based on a newspaper article that reported only that he was gay and involved in a gay student group. As the petitioners admitted in a contemporaneous letter, Dale was expelled because of a policy barring "membership to homosexuals." J.A. at 137. Petitioners' attempt to focus on Dale's speech at this stage of the litigation is entirely *post hoc*, based on statements Dale made long after he was expelled. And even those statements do not express any view on the morality of homosexuality. The statements merely assert what this lawsuit itself asserts, namely that Dale opposes the Boy Scouts' exclusionary policy, and is proud to be gay.[3]

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[3] The Boy Scouts rely on two statements that Dale made to the press well after his expulsion. Brief for Petitioners ("Pet. Br.") dated Feb. 28, 2000 at 9-10. The quotations say nothing more than that Dale

The Boy Scouts had no basis other than a stereotypical presumption about gay men for believing that Dale would express any message contrary to the Boy Scouts' views as an Assistant Scoutmaster.[4] He had successfully adhered to the Scouting code for over a decade, and there was no reason to believe that he would not continue to do so. Under Boy Scout policy, adult leaders are asked to defer questions about sexuality to the boy's family and religion. Pet. App. at 10a-11a. There is no basis in the record to believe that Dale would ignore that principle and advocate his own personal views about homosexuality.

Indeed, this case would not be here had Dale been expelled for his views. The LAD does not prohibit the Boy Scouts from excluding persons for expressing points of view contrary to the Scouts' philosophy. It only prohibits them

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is proud to be gay, and that he believes the Boy Scouts' exclusionary policy is wrong. If that were sufficient to justify a First Amendment defense, no anti-discrimination lawsuit would ever survive, for the very filing of the lawsuit announces that the plaintiff believes the exclusionary policy is wrong, and is proud to be a member of the protected class to which he belongs.

In any event, the statements are "after-acquired evidence," and therefore even if the Court deemed them relevant, they could be relied upon only to limit prospective relief, and only if the Boy Scouts met the heavy burden of showing that they would have expelled Dale for such statements irrespective of his gay identity. *McKennon v. Nashville Banner Publ'g Co.*, 513 U.S. 352, 360 (1995). The latter showing would be defeated here by the fact that the Boy Scouts have not sought to expel similarly situated heterosexual leaders who have expressed disagreement with the Boy Scouts' views on homosexuality. *See* Statement of Facts *supra*.

[4] The Court has condemned the use of stereotypes to justify exclusions such as the one here. *Board of Dirs. of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537, 548-49 (1987); *Roberts*, 468 U.S. at 627-28.



from excluding persons because of their "race, creed, color, national origin, ancestry, age, marital status, affectional or sexual orientation," *i.e.*, because of their *status*. N.J. STAT. ANN. § 10:5-4. As this Court described a similar law: "If a club seeks to exclude individuals who do not share the views that the club's members wish to promote, the Law erects no obstacle to this end. Instead the Law . . . prevents an association from using race, sex, and the other specified characteristics as shorthand measures in place of . . . legitimate criteria for determining membership." *New York State Club Ass'n, Inc. v. City of New York*, 487 U.S. 1, 13 (1988).

The Boy Scouts seek to collapse the line between status and speech by using the terms "avowed homosexuals" or "openly gay" persons. But that conflation does not transform the Boy Scouts' status-based discrimination into speech-based discrimination. Avowal of identity does not lead to expulsion from the Boy Scouts unless the person is gay. Just as it would be no defense to a race-based exclusionary policy to state that the policy applies only to persons who identify themselves as black despite their ability to "pass" as white, or to persons who say they are proud to be black, it is no defense for the Boy Scouts to limit their exclusionary policy to "avowed homosexuals."

### B. *Hurley* Protects the Right to Speak, Not the Practice of Status-Based Discrimination.

Because Dale was expelled for his status, not his views, *Hurley* does not control here. On the contrary, that decision relies on and reaffirms the very distinction that the petitioners seek to elide: between permissible speech-based exclusion and impermissible status-based discrimination.

The parade organizers in *Hurley* sought to exclude a gay contingent from marching not because its members were gay, but because they sought to use the parade to express a message contrary to the organizers'. The Court held that a

parade is by definition "a form of expression" and an exercise of First Amendment rights " 'in their most pristine and classical form.' "[5] It likened a parade organizer to a newspaper editor, and recognized that the organizer's First Amendment right to define the message of the parade necessarily includes the right to exclude those who express a contrary point of view.

The parade context was critical in *Hurley* because the parade organizers had no practical ability to dissociate themselves from the messages communicated by each contingent. In parades and protest marches, "each unit's expression is perceived by spectators as part of the whole." *Hurley,* 515 U.S. at 577. A membership organization, by contrast, has multiple methods easily available for making its own views clear, and apart from the "practice of discrimination," the LAD does not limit any of them.

The risk of compelled speech was heightened in *Hurley* by the gay contingent's express intent to use the parade as a platform for its views. The organization's very purpose for being was to express a message by marching in the St. Patrick's Day Parade. Here, the record contains no evidence that Dale intends to use his Scouting position as a platform, nor would the LAD preclude the Boy Scouts from expelling him if he did.

The flaw in petitioners' reasoning is illustrated by their contention that forcing them to reinstate Dale would be equivalent to forcing them to appoint a Ku Klux Klan member as an adult leader. Pet. Br. at 28. This ignores the very distinction between identity and viewpoint that governs here. Klan members are drawn together by philosophical beliefs, most centrally white supremacy. A person who

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[5] *Hurley*, 515 U.S. at 568-69 (quoting *Edwards v. South Carolina,* 372 U.S. 229, 235 (1963)); *see also Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 152 (1969).



advances the idea of white supremacy cannot insist upon a right to join an organization espousing racial equality.

Gay men and lesbians, by contrast, are drawn together only by identity, not by philosophical beliefs. Like sex, race, and national origin, gay or lesbian identity presupposes no set of beliefs whatsoever. Dale is more analogous to a person of color than to a Ku Klux Klan member. Of course, he believes in his own self-worth as a gay man, as did the African-Americans who sought to integrate facilities from which they had been excluded, and the women who challenged their sex-based exclusion from the United States Jaycees.[6] But if statements of pride in one's own identity were sufficient to transform impermissible status discrimination into protected expression, the prohibition on discrimination would be meaningless.

The Boy Scouts stress that Dale was a "leader," and therefore, they argue, he would speak for the organization whenever he donned his Boy Scout uniform. Pet. Br. at 19, 24. The Boy Scouts' emphasis on Dale's "leadership" position is somewhat disingenuous, however, because *all* of Scouting's 1.5 million adult members are "leaders," and the exclusionary policy applies indiscriminately to youth "members" and adult "leaders." Pet. App. at 3a, 11a.

It is simply not plausible to believe that every Assistant Scoutmaster will necessarily be perceived as always speaking for the Boy Scouts. Just as it is unlikely that an Assistant Scoutmaster who says he is a vegetarian would be perceived to speak for the Boy Scouts on issues of meat-eating, it is unlikely that a Scoutmaster who says he is gay would be perceived to be expressing Boy Scout policy on sexuality.[7]

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[6] One placard in an early civil rights demonstration stated simply, "I am proud to be a Negro." *Edwards,* 372 U.S. at 231.

[7] The view that homosexuality is not immoral might well carry far more weight for a boy if he heard it from a straight Scoutmaster

In fact, there is no reason to believe that boys who knew of a scoutmaster's gay identity would attribute any greater meaning to it than they would to the gay identity of a school teacher. Under the LAD, private schools in New Jersey are prohibited from refusing to hire openly gay or lesbian teachers.[8] "Role model" concerns do not generally justify deviation from equality mandates. *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 275-76 (1986) (rejecting "role model theory" for justifying race-based layoff decisions under affirmative action policy). The Boy Scouts should be treated no differently from a private school.[9]

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than if he heard it from a gay Scoutmaster. Yet the Scouts have not sought to expel heterosexual leaders who have expressed precisely that view, and affirmatively renewed the charter of an entire troop the expressed the view that homosexuality is moral. *See* Statement of Facts, *supra*

[8] N.J. STAT. ANN. §§ 10:5-12(a)-(e).

[9] Petitioners rely on a string of cases allowing organizations to employ leaders who maintain the organization's values. Pet. Br. at 33 n.9. Those cases, however, adhere to the very line we insist upon here, by holding that an organization cannot use its "value system" as a pretext for firing based on status. Specifically, unwed pregnancy cannot be used as the sole proxy for inconsistency with values, when that results in firing only unwed mothers and not unwed fathers. *Cline v. Catholic Diocese of Toledo*, No. 98-3527, 2000 WL 272258, at *3 (6th Cir. Mar. 14, 2000) ("Because discrimination based on pregnancy is a clear form of discrimination based on sex, religious schools cannot discriminate based on pregnancy.") (citations omitted); *Boyd v. Harding Academy of Memphis, Inc.*, 88 F.3d 410, 413 (6th Cir. 1996) (holding that the exemption from Title VII for religious organizations "does not . . . exempt religious educational institutions with respect to all discrimination"); *Ganzy v. Allen Christian Sch.*, 995 F. Supp. 340, 349 (E.D.N.Y. 1998) ("Restrictions on pregnancy are not permitted because they are gender discriminatory by definition.") (citation omitted). In *Harvey v. Young Women's Christian Association*, 533 F. Supp. 949 (W.D.N.C. 1982), the court upheld the firing of a counselor at a community service organization not merely because she was pregnant, but because she affirmatively sought to use her pregnancy to promote an "alternative lifestyle" to her young charges -- teenage girls in the neighborhood. *Id.* at 955. Dale does not seek to "model an alternative lifestyle" to his charges, and the Boy Scouts expelled him without any evidence concerning his views or intentions.



In short, to characterize this as a case about compelled speech is to stretch that term beyond its limits. The Court has protected the right not to speak where the state commanded citizens to express a message, by displaying a motto on a license plate,[10] saluting a flag,[11] or including a banner in a parade.[12] But complying with a mandate not to engage in status-based discrimination does not require an endorsement of a belief in anything, including the correctness of that law. The Boy Scouts remain free to say whatever they please about homosexuality, and to expel members or leaders who express contrary views. The dictate not to discriminate, without more, does not compel speech.

## II.

## NEW JERSEY'S ANTI-DISCRIMINATION LAW DOES NOT VIOLATE THE BOY SCOUTS' RIGHT OF ASSOCIATION.

All anti-discrimination laws trench on associational concerns to some extent, for they bar persons and groups from acting on their desires not to associate with members of

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[10] *Wooley v.* Maynard, 430 U.S. 705, 722 (1977).

[11] *West Virginia* State *Bd. of Educ. v. Barnette*, 319 U.S. 624, 670-71 (1943).

[12] *Hurley*, 515 U.S. at 573-75.

various minority groups.[13] But if that fact were sufficient to invalidate anti-discrimination provisions, the private sector would be immune from equality mandates. Thus, while "'[i]nvidious private discrimination may be characterized as a form of exercising freedom of association protected by the First Amendment . . . it has never been accorded affirmative constitutional protections.'"[14]

Instead, the Court has examined status-based nondiscrimination laws to determine whether they infringe on intimate or expressive association, and if so, whether they are narrowly tailored to further a compelling state interest.[15] As the New Jersey Supreme Court unanimously found, the Boy Scouts are not an intimate association. While the Boy Scouts are an expressive association, the requirement that they not discriminate on the basis of homosexual status does not impermissibly interfere with their expressive rights.

### A. The Boy Scouts' Right of Expressive Association Does Not Encompass a Right to Discriminate Based on Status.

The Boy Scouts undoubtedly associate for some expressive purposes, and it is critically important to protect

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[13] *See* Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 Harv. L. Rev. 1 (1959). Every act of discrimination can be characterized as the exercise of the right not to associate, from the maintenance of segregated schools, *Brown v. Board of Education*, 347 U.S. 483 (1954), to the decision by a law firm to deny partnership to a female attorney, *Hishon v. King & Spalding*, 467 U.S. 69 (1984).

[14] *Runyon*, 427 U.S. at 176 (quoting *Norwood v. Harrison*, 413 U.S. 455, 470 (1973)).

[15] *Board of Dirs. of Rotary Int'l*, 481 U.S. at 548-49; *Roberts*, 468 U.S. at 622-29; *see also New York State Club Ass'n, Inc.*, 487 U.S. at 13.



their First Amendment rights and those of similar private voluntary groups. But that is only the beginning, not the end, of the inquiry. The Boy Scouts must show that the requirement that they not expel members for homosexual *status* meaningfully impedes their *expressive* function.

In navigating the tension between nondiscrimination provisions and associational rights, the Court's cases draw a relatively bright line: where a group seeks to exclude persons based on their *expressing messages* contrary to the group's message, the First Amendment protects the group's right to do so. *Hurley*, 515 U.S. at 573-75. But where groups seek to exclude solely because of an individual's *status* or *identity*, the Court has uniformly rejected a First Amendment defense. *Roberts*, 468 U.S. at 622-29. This case squarely falls on the latter side of the line.

The Court has frequently confronted the claim that a law prohibiting status-based discrimination violates the right not to associate. It has just as frequently rejected the claim, whether presented by a labor union,[16] a private school,[17] a law firm,[18] or a civic organization.[19] In doing so, the Court has suggested that in all but the most extreme cases, a mere requirement not to discriminate on the basis of *status* does not violate the First Amendment.

In *Runyon v. McCrary*, 427 U.S. 160 (1976), for example, the Court expressly rejected a right of association objection to a law that barred status-based discrimination, even where the defendant was, like the Boy Scouts, centrally engaged in morals inculcation. There, an association of private schools maintained that the practice of excluding

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[16] *Railway Mail Ass'n v. Corsi*, 326 U.S. 88, 93-94 (1945).

[17] *Runyon*, 427 U.S. at 175-76.

[18] *Hishon*, 467 U.S. at 78.

[19] *New York State Club Ass'n, Inc.*, 487 U.S. at 8-9; *Board of Dirs. of Rotary Int'l*, 481 U.S. at 539; *Roberts*, 468 U.S. at 612-13.

African-American students was constitutionally protected by the right of association and the parents' right to direct the education of their children. This Court acknowledged that private schools and parents may be deeply committed to teaching the propriety of racial segregation, but rejected the argument that the schools' right to *practice* segregation was protected. "[I]t may be assumed that parents have a First Amendment right to send their children to educational institutions that promote the belief that racial segregation is desirable, and that the children have an equal right to attend such institutions. But it does not follow that the practice of excluding racial minorities from such institutions is also protected by the same principle." *Id.* at 176.

At the same time, the Court has repeatedly said that the First Amendment prohibits laws that require a group to admit members whose *ideology* or *political views* are contrary to the group's own expression. Thus, in upholding the application of a nondiscrimination provision to the United States Jaycees' exclusion of women, the Court stressed that "[t]he Act requires no change in the Jaycees' creed of promoting the interests of young men, and it imposes no restrictions on the organization's ability to exclude *individuals with ideologies or philosophies different from those of its existing members*." *Roberts*, 468 U.S. at 627 (emphasis added; citation omitted). Similarly, in *New York State Club Ass'n, Inc. v. City of New York*, 487 U.S. 1 (1988), the Court noted that the nondiscrimination provision "erect[ed] no obstacle" to a club that "seeks to exclude individuals *who do not share the views that the club's members wish to promote*." 487 U.S. at 13 (emphasis added). And in *Hurley*, the Court noted that "a private club could exclude an applicant whose *manifest views* were at odds with a position taken by the club's existing members." 515 U.S. at 580-81 (emphasis added).

Here, as in *Runyon* and the *Roberts* trilogy, the law at issue is not addressed to speech or message, and the group's challenged exclusionary policy is based on status, not



message. Accordingly, the requirement that the Boy Scouts admit gay members and leaders does not interfere with their expressive rights. They remain free to say what they want, and to dictate to any member or leader what he may and may not say on any given political or sexual issue. [20]

### B. Opposition to Homosexuality is Not So Central to the Boy Scouts' Function That a Nondiscrimination Requirement Will Substantially in Itself Undermine Their Expressive Purposes.

Amici agree with Justice O'Connor that "there may well be organizations whose expressive purposes would be substantially undermined if they were unable to confine their membership to those of the same sex, race, religion, or ethnic background, or who share some other such common bond." *New York State Club Ass'n, Inc.*, 487 U.S. at 19. Unless the anti-discrimination laws are to be rendered nugatory, however, that exception must be narrowly confined to groups centrally organized around a message of exclusion that would be directly undermined by the nondiscrimination requirement. The Boy Scouts, a large, multifaceted national organization "open to all boys," not organized for the purpose of advancing any specific message, and not even committed to enforcing its

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[20] The Boy Scouts argue that the LAD nonetheless trenches on their expressive rights because their membership criteria are themselves a form of expression, and Dale quite plainly disagrees with those criteria. Pet. Br. at 21. But if such a disagreement were sufficient to defeat a nondiscrimination law, the First Amendment would always trump nondiscrimination statutes. The women who sought admission to the Jaycees, the Rotary Club, and the various clubs associated in the New York State Club Association all obviously disagreed with those organizations' views on whether women should be admitted. But there, as here, the key fact was that the exclusions were not based on that philosophical disagreement, but on the applicants' *status* as women.

leaders to adhere to its message on homosexuality, do not fit within this narrow exception.

In this regard, the Boy Scouts are usefully contrasted with the Ku Klux Klan. The latter group is expressly organized around an exclusionary principle of white supremacy. To require the Klan to admit blacks would substantially undermine the Klan's central expressive purpose. But to their credit, the Boy Scouts, a huge inclusive organization numbering millions of members, are not the Ku Klux Klan. And as such, requiring them to admit gay members and leaders will not undermine their core expressive purposes.[21]

The Boy Scouts assert that their "moral code" includes a belief in the immorality of homosexuality. As the *Roberts* trilogy and *Runyon* illustrate, however, an organization's sincere belief that it should exclude certain categories of people, or that admitting such people will undermine its expressive function, is not sufficient to trump the application of an anti-discrimination law. The issue is not whether the Boy Scouts have this belief, but whether the belief is so central to their existence that the mere requirement that they not exclude applicants for being gay would so compromise their core function as to warrant an exemption from an otherwise generally applicable nondiscrimination law.

Courts must be wary about second-guessing the views of private organizations, and cannot substitute their views of a group's philosophy for that of the group itself. However, the Court cannot avoid the responsibility of assessing whether

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[21] A claim that the Boy Scouts must admit girls, by contrast, would be a more difficult case. There is no question that the Boy Scouts are centrally organized around the principle of fellowship specifically among boys. The determinative issue under *Roberts* would be whether mandating the admission of girls would substantially undermine the Boy Scouts' expressive function.



the mere application of an anti-discrimination law will undermine the group's expressive function so fundamentally that the First Amendment compels an exemption. Thus, in *Roberts,* the Court did not simply accept at face value the Jaycees' argument that because the Jaycees' core purpose was "to advance the interests of young men only," requiring them to admit women "would effectively destroy the Jaycees' ability to achieve its core purpose, namely furthering the interest of young men."[22] Rather, it independently reviewed the record, and found "no basis in the record for concluding that admission of women . . . will impede the organization's ability to . . . disseminate its preferred views." *Roberts,* 468 U.S. at 627.

The record here similarly shows that the LAD will not impede the Boy Scouts' ability to disseminate its views on homosexuality. The Boy Scouts have many ways to communicate their views to their members and the public, including the Oath and Laws that every Boy Scout is required to learn and follow, the handbooks distributed to all youth who join, a separate handbook for adult leaders, and numerous other publications. Yet it is striking that *none* of their many existing publications even expresses the Boy Scouts' belief that homosexuality is immoral. Instead, the Boy Scouts strain to rely on vague terms like "clean" and "morally straight," terms that the Scouting materials themselves define in ways that do not implicate homosexuality one way or another.

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[22] Br. of Appellee, United States Jaycees at 8, 9, *Roberts v. United States Jaycees*, 468 U.S. 609; *see also* Br. of Appellant, New York State Club Ass'n, Inc. at 34, *New York State Club Ass'n, Inc.*, 487 U.S. 1 (arguing that applying nondiscrimination law to clubs that exist primarily for the purposes of espousing unpopular ethnic, racial or gender related positions plainly interferes with the "right of expressive association").

More importantly, the Boy Scouts do not require members or leaders to commit to the view that homosexuality is immoral. The Scouts have a formal application process for those seeking to become adult leaders.[23] Yet they impose *no* requirement that prospective leaders hold or express any view on the morality of homosexuality. The Scouts have not sought to expel members, leaders, and even entire troops who state publicly that they believe homosexuality is moral. *See* Statement of Facts, *supra*. Instead, they have expelled only gay Boy Scouts. If the Boy Scouts tolerate heterosexuals who openly contradict the Scouts' view that homosexuality is immoral, they cannot credibly maintain that merely being required to admit a homosexual will undermine their expressive function.

Under the LAD, the Boy Scouts are free to require all members to commit to the view that homosexuality is immoral. That requirement would likely have the effect of excluding most gay men. (It would not, however, exclude all gay men, because no doubt some gay men believe that homosexual sexual conduct is immoral, just as many heterosexuals engage in sexual activities that they believe are immoral.) But such a requirement would also exclude many heterosexual men. Indeed, given the proportion of the population believed to be gay,[24] and the number of straight men who believe that homosexuality is not immoral,[25] it is

[23] Pet. App. at 174a-175a; *see also* Pet. Br. at 4.

[24] According to the most comprehensive recent study on sexuality, 2.8 percent of men self-identify as "homosexual." ROBERT T. MICHAEL, ET AL., SEX IN AMERICA, 176 (1994).

[25] According to a recent Gallup poll, 50 percent of respondents to a poll answered that "homosexuality should be considered an acceptable alternative lifestyle." Frank Newport, *Some Change Over Time in American Attitudes Towards Homosexuality, but Negativity Remains*, THE GALLUP ORGANIZATION (Mar. 1, 1999) <http://www.gallup.com/poll/releases/pr990301b.asp>.



likely that such a policy would disqualify more straight men than gay men. It might also repel a significant number of the organizations upon which the Boy Scouts rely to serve as troop sponsors.[26]

But that is not what the Boy Scouts have done. Instead, they seek to enjoy all the advantages that accrue from broad public solicitations for membership and financial support,[27] while selectively invoking a viewpoint defense in order to justify expelling certain individuals because of their status. If the Boy Scouts do not compel their leaders or members to adhere to their views on homosexuality, they cannot use that justification as an exemption to an otherwise applicable nondiscrimination law.

### C. The Boy Scouts Are Not an Intimate Association.

The Boy Scouts' contention that requiring them not to exclude gay members and leaders violates their right of intimate association is easily dismissed. For starters, this argument proves too much: if the Boy Scouts are right that they are an intimate association, they would be equally free to expel all black members. In fact, the Boy Scouts are not the type of intimate association that is largely immune from nondiscrimination laws.

The Supreme Court has acknowledged that it may be unconstitutional to legislate with respect to certain intimate associations, such as those of the family. *Roberts*, 468 U.S.

[26] Pet. App. at 55a-56a.

[27] Membership in the Boy Scouts totals approximately 5 million. According to independently reported data, the Boy Scouts of America had total revenue in 1998 of more than $250 million, net income of almost $70 million and net assets of more than $450 million. It employed 500 persons. Hoover's Online, *Boy Scouts of America Capsule* (last visited Mar. 23, 2000) <http://www.hoovers.com/co/capsule/2/0,2163,56152,00.html>.

at 618-19; *Moore v. City of East Cleveland, Ohio*, 431 U.S. 494, 498-99 (1977) (plurality opinion). But it has also refused to extend the mantle of intimate association to groups that are in all material respects identical to the Boy Scouts. In *Board of Dirs. of Rotary International v. Rotary Club of Duarte*, 481 U.S. 537, 546 (1987), the Court found that the Rotary Club, a national organization made up of local chapters that were as small as "fewer than 20" members, was not an intimate association. In *Roberts*, the Court held that the Jaycees were not an intimate association, where its local chapters were "neither small nor selective," and it invited nonmembers to many functions. In both cases, the Court relied heavily on the fact that the organizations had open and inclusive membership policies. 468 U.S. at 621.

The Boy Scouts are similarly a national organization, comprised of local troops of between 15 and 30 members, with an open and inclusive membership policy. The Boy Scouts state that they are "open to all boys," and "[n]either the charter nor the bylaws of the Boy Scouts of America permits the exclusion of any boy." Pet. App. at 78a (citation omitted). Moreover, the Boy Scouts routinely invite nonmembers to functions. J.A. at 406; *see also* J.A. at 176-77. In addition, the Boy Scouts' extensive links to both federal and state governmental entities undermines any claim that they are an intimate organization.

### D. Any Limitation on the Boy Scouts' Expressive Associational Rights Is Justified By New Jersey's Compelling Interest in Eradicating Invidious Discrimination.

Even where a nondiscrimination law infringes on the right of association by intruding on the group's "internal structure and affairs," the right "is not absolute." *Roberts*, 468 U.S. at 623. "Infringements on that right may be justified by regulations adopted to serve compelling state interests, unrelated to the suppression of ideas, that cannot be achieved



through means significantly less restrictive of associational freedoms." *Id.* (citations omitted). As in the *Roberts* trilogy, that test is easily met here.

First, as in *Roberts*, the LAD serves a "compelling interest in eradicating discrimination." *Id.* It embodies New Jersey's legislative will to require equal access to the fullest range of activities in the public sphere, interactions that Justice Kennedy described as "ordinary civic life in a free society." *Romer v. Evans*, 517 U.S. 620, 631 (1996). It cannot be disputed that such anti-discrimination laws serve a compelling state interest. See *Hurley*, 515 U.S. at 571-72; *Roberts*, 468 U.S. at 625-26; *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 258-62 (1964).[28]

New Jersey's interest in eradicating discrimination on the basis of sexual orientation is especially compelling. New Jersey has outlawed such discrimination in virtually every facet of public life. It is unlawful in New Jersey to refuse to hire, fire or promote a person based on sexual orientation, both in public and private workplaces.[29] It is unlawful to refuse "to contract with . . . or otherwise do business with" a person based on sexual orientation.[30] Family courts may not

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[28] The fact that the Court has not decided whether sexual orientation discrimination is subject to strict scrutiny under the Equal Protection Clause does not affect the determination that a state's interest in eradicating such discrimination is compelling. *See, e.g.*, *Hurley*, 515 U.S. at 571-72 (noting historic pedigree of anti-discrimination laws); *Roberts*, 468 U.S. at 625-26 (same). New Jersey's right to take concerted steps to eradicate sexual orientation discrimination should be viewed as an aspect of state sovereignty, and not subject to downgrading based on this Court's assessments of scrutiny levels under the Fourteenth Amendment. *Cf. Pruneyard Shopping Ctr. v. Robins*, 447 U.S. 74 (1980).

[29] N.J. STAT. ANN. §§ 10:5-12(a)-(e); N.J. STAT. ANN. § 10:2-1; Florio Exec. Order No. 39 (Aug. 16, 1991).

[30] N.J. STAT. ANN. § 10:5-12(l).

deny or curtail custody or visitation rights to a gay or lesbian parent solely because of that parent's sexual orientation.[31] An adoption petition may not be denied based on the adoptive parent's sexual orientation.[32] Moreover, natural parent-same sex partner couples who seek to adopt as a couple are entitled to equal treatment with natural parent-stepparent couples seeking to adopt.[33] Sale, purchase or rental of private residences cannot be made subject to an individual or couple's sexual orientation,[34] nor can credit be denied on that basis.[35] Both criminal[36] and civil[37] liability attaches to bias crimes that are targeted at lesbians or gay men. In short, the command of equal treatment for lesbians and gay men permeates "ordinary civic life" in New Jersey.

Anti-discrimination law effectuates a state's interest in maintaining a level playing field in market relations, but also in ending the stigma that pervades the full range of an individual's life in the public sphere.[38] That is all the more true when the organization at issue is extremely large and nonselective, advertises itself so strongly as a developer of good citizens, and has historically proclaimed its partnership

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[31] *V.C. v. M.J.B.*, 319 N.J. Super. 103, 118-19, 725 A.2d 13, 22-23 (App. Div. 1999); *M.P. v. S.P.*, 169 N.J. Super. 425, 432-33, 404 A.2d 1256, 1260 (App. Div. 1979).

[32] *Matter of Adoption of Two Children by H.N.R.*, 285 N.J. Super. 1, 8-9, 666 A.2d 535, 538 (App. Div. 1995); *Matter of Adoption of Child by J.M.G.*, 267 N.J. Super. 622, 629-30, 632 A.2d 550, 553-54 (Chancery Div. 1993).

[33] *id.*

[34] N.J. STAT. ANN. §§ 10:5-12(f)-(h).

[35] N.J. STAT. ANN. § 10:5-12(i).

[36] N.J. STAT. ANN. § 2C:33-4.

[37] N.J. STAT. ANN. § 2A:53A-21.

[38] *Roberts*, 468 U.S. at 625.



with agencies of the state so frequently, as the Boy Scouts.[39] In enacting the LAD, the legislature found that discrimination based on sexual orientation "menace[d] the institutions and foundation of a free democratic State."[40] As is true of other civil rights statutes, New Jersey's lawmakers concluded that sexual orientation discrimination "violates a most fundamental [state] public policy."[41]

Second, the LAD's compelling interest is "unrelated to the suppression of ideas." *Roberts*, 468 U.S. at 623. As noted above, the LAD prohibits only discrimination on the basis of status, and leaves groups free to discriminate on the basis of speech. "[G]enerally applicable laws do not offend the First Amendment simply because their enforcement . . . has incidental effects" on expression. *Cohen v. Cowles Media Co.*, 501 U.S. 663, 669 (1991). The LAD is a neutral law of general applicability that bars a particular form of harmful conduct – discrimination based on sexual orientation – irrespective of the message that conduct expresses. *Cf. Romer v. Evans*, 517 U.S. 620 (1996).

Finally, New Jersey's interest in eradicating discrimination on the basis of sexual orientation could not "be achieved through means significantly less restrictive of associational freedoms." *Roberts*, 468 U.S. at 623 (citations omitted). Like the laws upheld in the *Roberts* trilogy, the LAD prohibits only status-based discrimination, and does not seek to limit in any way what organizations can say. It exempts organizations that are "distinctly private" or have a religious educational function, and individuals serving *in loco parentis*.

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[39] Pet. App. at 24a-31a.

[40] N.J. STAT. ANN. § 10:5-3.

[41] *Bob Jones Univ. v. United States – Goldsboro Christian Sch., Inc.*, 461 U.S. 574, 593 (1983).

As described above, the Boy Scouts have ample opportunities to express their condemnation of homosexuality. No law bars the Boy Scouts from forbidding specific conduct or statements by members or leaders during any of its activities. New Jersey has barred only acts of status-based discrimination, and has not sought to extend that bar in any way to expression-based action.

## CONCLUSION

Enforcement of the New Jersey civil rights law in this case will not undercut the expressive rights of private organizations to advocate their views. The Boy Scouts will be barred from engaging in the practice of status-based discrimination, but that obligation does not compel them to express any view, does not undermine their freedom to communicate their own message about homosexuality, and does not preclude them from denying membership to those boys or adults who dissent from the Boy Scouts' message. Rather than exercising their constitutional right to control their message by restricting membership to those who share that viewpoint, they have simply sought to purge the organization of openly gay youth and men. That is precisely what anti-discrimination laws prohibit.

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